NOT INCLUDED IN BOUND VOLUMES

PBH Brooklyn, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEZONOS MAVEN BAKERY, INC.

and Case 29-CA-25476-M

LATINOJUSTICE PRLDEF[1]

ORDER DENYING MOTION FOR RECONSIDERATION[2]

On August 9, 2011, the National Labor Relations Board issued a Supplemental Decision and Order in this compliance proceeding, in which the Board concluded that it was foreclosed from awarding backpay to undocumented workers by the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).[3] In *Hoffman*, the Court overturned a backpay award to an undocumented discriminatee who had violated the Immigration Reform and Control Act (IRCA) by presenting fraudulent work-authorization documents to his employer. In this case, the Respondent violated IRCA by hiring the

[1] The Charging Party states that it changed its name from Puerto Rican Legal Defense and Education Fund to LatinoJustice PRLDEF on October 6, 2008.

[2] Member Becker, who is recused, is a member of the panel but did not participate in the consideration of this case. In *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644; see *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

[3] 357 NLRB No. 47 (2011).

discriminatees—whom the General Counsel agreed to assume were undocumented—without verifying their authorization to work in the United States. After carefully analyzing the Court's *Hoffman* decision, the Board concluded that this distinction made no difference: under either scenario, *Hoffman* precluded backpay. The Board based its conclusion on the wording of the Court's holding, policy grounds the Court invoked, and other language in *Hoffman* "ma[king] clear that which party violated IRCA was immaterial to [the Court's] holding."[4] In the Board's view, the Court's rationale was that "[r]egardless of which party violates [IRCA], the result is an unlawful employment relationship," and awarding backpay to undocumented workers improperly "legitimiz[es] that relationship" by "replac[ing] lost wages that 'could not lawfully have been earned' in the first place."[5] Thus, the Board concluded, "[t]he clear implication of the Court's decision is that awarding backpay to undocumented workers lies beyond the scope of our remedial authority, regardless of whether the employee or employer violated IRCA."[6]

On September 6, 2011, the Charging Party filed a motion for reconsideration. The Charging Party contends that the Board based its decision denying backpay on its own finding that the discriminatees were party to an unlawful employment relationship resulting from an IRCA violation, and that the Board itself held that it was immaterial that the IRCA violator was the Respondent. The Charging Party claims that reconsideration is warranted on

[4] *Mezonos*, supra, 357 NLRB No. 47, slip op. at 4.
[5] Id., slip op. at 2-3 (quoting *Hoffman*, supra, 535 U.S. at 149).
[6] Id., slip op. at 4.

two grounds. First, the parties did not litigate this issue: the Respondent did not rely on an unlawful employment relationship theory in its exceptions, but argued only that the case was controlled by *Hoffman*. Second, contrary to the Board's decision in this case, Board precedent stands for the proposition that backpay will be awarded where an employer knowingly employs workers who are legally ineligible for their positions.

As set forth above, and contrary to the Charging Party, the Board did not rest its decision to deny backpay on its own finding that the discriminatees were party to an unlawful employment relationship. Neither did the Board deem immaterial the employer-or-employee identity of the IRCA violator. Rather, it said that this was the rationale the Court relied on in *Hoffman*. Read in context, all of the language the Charging Party draws from the Board's decision was directed toward explaining why the Board concluded that *Hoffman* precludes backpay awards to undocumented workers regardless of which party violated IRCA. And because, as the Charging Party acknowledges, the Respondent's exceptions advanced the view that *Hoffman* forecloses backpay, the Board did not base its decision on a ground the parties did not litigate. Finally, we find no merit to the Charging Party's argument that the decision is inconsistent with Board precedent.[7]

[7] The Charging Party cites the following pre-*Hoffman* cases: *New Foodland Inc.*, 205 NLRB 418 (1973); *The Embers of Jacksonville, Inc.*, 157 NLRB 627 (1966); *Future Ambulette, Inc.*, 307 NLRB 769 (1992), enfd. mem. 990 F.2d 622 (2d Cir. 1993); *Local 57, Int'l Union of Operating Engineers*, 108 NLRB 1225 (1954); and *Douglas Aircraft Co.,* 10 NLRB 242 (1938). In *New Foodland* and *Embers of Jacksonville*, the employers raised the discriminatees' legal ineligibility to work—specifically, their underage status—as a merits defense to a Sec. 8(a)(3)

Having duly considered the matter, we find that the Charging Party has not presented "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations. Accordingly, it is ordered that the Charging Party's motion for reconsideration is denied.

Dated, Washington, D.C., November 3, 2011.

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

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discharge allegation. In each case, the Board rejected the defense as pretextual and ordered backpay (among other remedies), but nothing in either decision suggests that the propriety of that remedy was put at issue. Backpay was put at issue in *Future Ambulette* and *Local 57*, but in each of those cases the Board found backpay warranted despite the discriminatee's lack of a relevant *state-issued* license during the backpay period. In *Hoffman*, by contrast, the Court overturned the Board's backpay award because it conflicted with congressional policies underlying a *federal* statute: "[W]e have . . . never deferred to the Board's remedial preferences," said the Court, "where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman*, supra, 535 U.S. at 144. Last, in *Douglas Aircraft*, the Board did award a non-U.S. citizen backpay based on a position he apparently could not legally occupy under then-applicable federal law, although he was otherwise legally employable; but the decision contains no discussion of the law or its policy objectives. 10 NLRB at 282.